

No. 11382.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and  
JACK L. KISSEL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Upon Appeal from the District Court of the United States for the  
Southern District of California, Central Division.

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## APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

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The appellee's brief does not meet the issues presented upon appeal. It sidesteps them by attempting to justify the admissibility of the evidence because of its probative value regardless of whether it was lawfully obtained.

Appellants have contended that there was no competent evidence of their guilt. In response to this, appellee says, on pages 7 and 8, that the witness Dvorak's testimony was uncontradicted. We know of no better contradiction than the witness' own testimony. It is true that this witness, in answer to preliminary questions, had testified to his conclusions that appellants had required him to pay over ceiling prices, but on cross-examination, he could not designate the time of this conversation, nor what was said.

We do not wish to deprive appellee of the advantages of any competent and admissible testimony, but we believe that the following portion of Mr. Dvorak's testimony on cross-examination dissipates its effect entirely.

“Q. And you testified that in the fall of 1942 that you had a discussion with Mr. Shubin at your place of business. Do you remember that testimony?

A. Yes, sir.

Q. Prior to the time that he came to your place of business you had purchased some meat which the Shubins had had delivered to your place of business, hadn't you? A. Yes, sir.

Q. And your butcher, who was there, paid them what you believed was more than the ceiling price?

A. Yes, sir.

Q. And you called Mr. Shubin on the telephone and told him that there had been an overcharge of \$7.50? A. Yes, sir.

Q. And Mr. Shubin immediately brought you the money out and he paid you \$15.00 instead of \$7.50, didn't he? A. Yes, sir.

Q. And at that time you had a discussion with Mr. Shubin regarding the difficulty of obtaining meat in the meat market, didn't you? A. Yes, sir.

Q. At that time you were purchasing meat from other people than the Vernon Hotel & Restaurant Supply Company, weren't you? A. Yes.

Q. Several other concerns? A. Yes.

Q. And you were having difficulty at all of those places in getting meat? A. Yes.

Q. And Mr. Shubin said to you, after you told him of your difficulties, in substance, if you want to stay in business you got to play ball these days; is that what he said? A. Yes.

Q. Did Mr. Shubin tell you at that time that you had to pay him any price in excess of the ceiling price? A. No.

Q. Now, thereafter you came to Mr. Shubin's place of business, I think the next day, and you told him that you were unable to get any meat from anybody, didn't you? A. Yes.

Q. And Mr. Shubin gave you a truck load of meat, didn't he, or told you that you could take it? A. Yes.

Q. And did he tell you that you had to pay anything over ceiling? A. Not at that time; no, sir.

Q. From then on, when you purchased meat, you would see Mr. Shubin or Mr. Kissel? A. Yes.

Q. As you testified? A. Yes.

Q. Now, can you tell the court and the jury of any particular time when Mr. Shubin or Mr. Kissel asked you to pay them any money over ceiling, when they requested it?

The Witness: Would you ask me that again?

The Court: The reporter will repeat the question.

(Question read by the reporter.)

A. Well, I can't pick out any one certain date or certain amount, but there was a set figure that I had to pay.

Q. By Mr. McLaughlin: Well, what I am trying to get at is just when that discussion took place. Now, thus far there is nothing in the record on it and you have to help us now, if you can, and tell us when there was such a discussion. A. Well, that is a long time to remember word for word.

Q. Well, you testified when Mr. Shubin came out and paid you the money, which you said had been an overcharge, that you had a discussion. He did not ask you for any overcharges then, did he? A. No, sir.

Q. All right. Now, you must have in your mind some time when Mr. Shubin or Mr. Kissel asked you or told you that if you wanted to buy meat from them you had to pay them in excess of the ceiling.

The Court: When you say 'Shubin,' there are two.

Mr. McLaughlin: I am sorry. Mr. Shubin or Mr. Kissel. A. Well, I can't pick out how much was stated at that time, but I—

Mr. Neukom: Let the witness explain.

Mr. McLaughlin: We haven't any time yet. Let us get a time first. A. Well, when I started back in business with them they come to some set figure that I had to pay.

Q. Mr. Dvorak, I am trying to get, as near as you can fix, a time and place where either of the Shubins or Mr. Kissel were present when it was told to you that you had to pay over ceiling. Now, you try and help us fix that time and place and then we can go from there on as to what they said and what you said. A. Well, I would say the first of '43, to be more sure of it, or the last part of '42.

Q. How long after the time that Mr. Shubin came to your place of business to repay you the \$7.50? A. Well, right at that time I quit buying from them for a short spell in there, and then I went back of my own accord to purchase meat from them.

Q. You called on them? A. I called on them; yes, sir.



Q. All right. And you saw who? A. Bill.

Q. That was at the plant? A. At the plant.

Q. Will you state what you said and what Bill said, as near as you can state it? A. Well, I told him—well, prior to that time, while he was at the shop he told me that I didn't—

Q. Wait now. We want this discussion. If there was a prior one, we will take it. Was there a prior one? A. Well, this is in connection with it. I just want to relate the things that brought me there.

Q. You had a discussion with Mr. Shubin before you went to his plant, then? A. Yes. He told me I didn't have to buy meat from him or—

Q. We have to get the place and the parties. Before you went to the plant, you had another discussion with Mr. Shubin? A. Well, that was the same one. A little of it is coming back to me. He told me that I didn't have to buy from him but he always thought quite a little bit of me and didn't claim—he didn't want me to lose my business by not having merchandise; and he told me if I ever felt different about it, that I could always buy if I wanted to. So I went back there of my own accord to purchase meat.

Q. All right. Then you went to the plant. Have you stated everything that was said at the discussion you have just related? A. As near as I can remember.

Q. You went to the plant and what was said then? A. Well, I can't recall the exact words that were mentioned at that time, but no doubt, naturally, I come there for merchandise.

Q. Well, Mr. Dvorak, if you can't recall any words, nobody on earth can make you testify to that,

and you shouldn't. So, when you can't recall, say you can't. But if there is any part of a conversation you can recall, you tell the jury and the court what was said. A. Well, I want to stick to the truth as much as I can. I don't want to guess at something. I can't suck something out of my thumb if I don't know.

Q. Well, do you want the jury— A. I just don't recall.

Q. All right; that is all right. Now, do you have any recollection of any other discussions, then, at which you were told by any of the defendants that you had to pay over ceiling, leaving the one that you said you did not recall? If you had, say 'yes' and then we will fix the time and place? A. Yes.

Q. All right. Now, fix the time and the place. A. Well, it must have been at that time or shortly thereafter that there was some set price fixed.

Q. Well, now, wait. I want to get the time and the place and the parties, and then we will get to the discussion. You say that— A. Well, dates I do not remember.

Q. Now, you have already testified that you did not recall what was said at the discussion that you had when you first came to the plant after this lapse of time that you were not doing business with them; that is correct, isn't it? A. Yes.

Q. So it was not at that discussion? A. Well, it must not have been, then.

Q. All right. Did you have another discussion that you recall where you discussed with them the paying of over ceiling? A. I can't recall that I did." [R. 184-189.]

Pages 14 to 24 of appellee's brief is devoted to a summary of the testimony given by the Internal Revenue Agents. There is no serious controversy as to what these men testified to. The only issue is whether it was admissible because it was given after refreshing their memory from inadmissible documents, and because it was information obtained in the course of their official duties as such internal revenue agents, and therefore an "Information or Supplementary Return" within the meaning of the applicable Treasury Regulations. These agents testified that they were taking appellants' statements as supplementary information to their returns. [R. 318, 344 and 384.]

The trial court held that the written transcripts of these confessions were inadmissible because they were not obtained pursuant to the applicable Treasury Regulations [R. 284-309], and we believe that it should have consistently excluded the oral testimony as to the contents of these transcripts, particularly where the agents admitted refreshing their recollections from them. [R. 332, 348, 351, 400, 401, 419 and 420.]

The statute and the Treasury Regulations limiting access to income tax returns were obviously enacted with some purpose in view. Congress must have believed

that some immunity should be granted to taxpayers who were willing to pay their taxes on gains that might subject them to some other criminal penalty if disclosed. Neither the statute nor the regulations permit the Attorney General an unrestrained access to these returns.

If the Attorney General made a blanket request to the Commission of Internal Revenue for copies of all returns that showed a violation of any criminal statute, it should clearly be refused under these regulations.

The regulations show an intent that the returns be made available only when material to a grand jury investigation or trial of some party or parties. They require that the names of the parties be given whose returns are desired. Here the appellants' returns were not requested by the United States Attorney, but the Commissioner voluntarily included them. The situation is no different than one where the Commissioner delivered the returns without any request therefor whatsoever.

Suppose the return of a corporation had been requested and the Commissioner voluntarily included the returns of all of its shareholders. Could these returns be used to indict and convict such shareholders? Is there any difference where the return of a partnership is requested, and if so, would a request for the partnership return authorize the Commissioner to furnish the personal returns of all the partners? The Commissioner is not vested with power to furnish returns or supply information which is not even requested pursuant to the Regulations.

Appellee, on page 37, advances a novel theory that the trial court had power to override the express provisions of the statute and its regulations in any event. This is the first time that we have ever heard it urged that any court could waive or nullify the provisions of a statute conferring a right or an immunity.

In our opening brief (App. Br. 67), we asserted further error in admitting the testimony of the Internal Revenue Agents as to their conversations with each of the individual appellants, as proof of any conspiracy. Appellee attempts to answer this by stating that each of such statements were offered against the particular appellant who made it. (App. Br. p. 47.) This was true as to the written statements which the trial court excluded [R. 383], but not as to the oral testimony of the agents as to what each appellant said when such written statements were being taken down for transcription by the government reporter. There was no such limitation as to the testimony of any of these Internal Revenue Agents.

A complete answer to appellee's contention that the statements of each appellant were admissible in proof of the conspiracy against all of them appears in the recent cases of *Fishwick v. United States*, 91 L. Ed. 183, 67 Supreme Court Reporter 224; and *Canella v. United States*, 157 F. (2d) 470, both decided since the filing of appellants' opening brief.

**Appellants' Motion to Dismiss Should Have Been  
Granted Because the Indictment Specifies the  
Wrong Statute.**

Although this point was not urged in appellants' opening brief, we believe it has sufficient grounds to merit its presentation at this time. The indictment in all of its references to the Act specified the Emergency Price Control Act of 1942, and the Maximum Price Regulations promulgated pursuant to that Act. This Act, by its terms, expired in 1943, and at all of the alleged violations took place after that date, neither that Act nor its regulations could have controlled the situation. The indictment fails to refer to the Amended Emergency Price Control Act in any single instance.

See:

*United States v. Chambers*, 291 U. S. 217;

*United States v. Hark*, 320 U. S. 531, 88 L. Ed.  
290.

For this reason, appellants' Motion to Dismiss [R. 37] should have been granted.



### Conclusion.

The issues are clear-cut and we again respectfully direct this court's attention to the language of the United States Supreme Court in the case of *Bollenbach v. United States*, 90 L. Ed. 318, 66 Supreme Court Reporter, 403, to the effect that "the question is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury according to the proceedings and standards for criminal trials in Federal Courts."

Respectfully submitted,

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